
CRITICAL ANALYSIS OF GENERAL LIEN FOR ADVOCATES IN INDIA AS AGAINST THE UNITED KINGDOM

Nikita Karen, Jindal Global University

ABSTRACT

This paper gives a detailed analysis of India's stance on Advocate's lien under section 171 of Indian Contract Act, 1872 by comparing the law in the United Kingdom, based on whose law the statutory provision the Indian Contract Act, 1872 is drafted. An Advocate lien is the right of the advocate to retain the client's property until such time that the client has paid his fees or any payment due to the advocates and England both being a common law country have different stance on this concept. while United Kingdom recognizes a general lien for Advocates to recover their unpaid fees, India has taken a more restrictive approach.

The legal history of India through case laws from P. Krishnamachariar V. Official Assignee of Madras, 1931 to R.D. Saxena V. Balram Prasad Sharma, 2000 shows how India gradually becomes more and more restrictive towards allowing a general lieu for advocates. In R.D. Saxena v. Balram Prasad Sharma the court finally held that Advocates do not have the right to retain case files as a form of general lien under section 171 of Indian Contract Act, 1872 and stated that the Advocates must resort to legal proceedings to recover the unpaid fees from their client. This paper critically analysis if the remedies available for the Advocates in India is sufficient. Further, this paper also explores the stance of United Kingdom regarding its stance on Solicitor's lien to cluck if any of the remedies available in the UK can be adopted in India. The paper ultimately questions if India should reconsider its position on the same so as to balance the rights of the Advocates and their clients equally.

Introduction:

A lien is a right that a bailee has against the bailor to retain possession of goods until a debt or claim is settled. Section 170¹ and section 171² of the **Indian Contract Act 1872** deals with this right of bailee. This paper will dissect a specific kind of general lien mentioned in Section 171 of the Indian Contract Act³, an Advocate's lien, and the stance of India concerning an advocate's lien as against the stance of the United Kingdom.

An Advocate's lien is the right of the advocate to retain the client's property until such time that the client has paid his fees or any payment due to the advocate for his service. This lien acts as a form of security for the advocates in cases where the said advocate is not being compensated by the client. There are two types of Advocate's lien derived from the English common law. The first is a retaining or general lien, this general lien is attached to papers, documents, money, securities, and other property of the client that comes into the lawful possession of the advocate while performing his services that is, the advocate has the right to retain the documents mentioned above until the client pays his fees for the services of the advocate. The second type of lien is a charging or special lien, this lien is the right of the advocate to receive a charge on the judgment, award, or decree that the advocate obtains for their client. An Advocates lien was introduced as a concept in the case of **Cohen v. Goldberger, 1923**⁴ in which the court held that "We find no basis for the contention . . . that a lien cannot be asserted by attorneys, in the absence of an agreement with their client that they should have such lien"⁵.

In the Indian context, an Advocate's lien is dealt with in **section 171 of the Indian Contract Act, 1872**⁶ which states that, "Bankers, factors, wharfingers, **attorneys of a High Court** and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect". **Section 171 of The Indian Contract Act, 1872**⁶ deals with general lien as previously

¹ Indian Contract Act, 1872, § 170, No. 9, Acts of Parliament, 1872 (India).

² Indian Contract Act, 1872, § 171, No. 9, Acts of Parliament, 1872 (India).

³ *Id.*

⁴ *Cohen v. Goldberger*, 109 Ohio State 22 (1923)

⁵ Arthur F. Lustig, *Attorney's Liens*, 7(3) Clev. St. L. Rev. (1958)

⁶ Indian Contract Act, *Supra note* [2]

mentioned. We will discuss the implementation of this Section in the Indian context and critically analyze it with the role of Advocate's lien in the United Kingdom.

The stance of India regarding Advocate's lien:

Section 171 of The Indian Contract Act⁷ specifically addresses "attorneys of a high court" to be applicable and is silent if advocates are also included in the same. Who is an advocate? An advocate is someone who practices in court. The Indian courts in various cases address this issue. In **P.Krishnamachariar v. Official Assignee of Madras, 1931**⁸ the court held that an Advocate will not come in the purview of Section 171 of The Indian Contract Act, 1872⁹ and that the said advocate should have an express agreement for supporting his claim for a lien. Advocates Act, 1961¹⁰ was passed because of which attorneys ceased to be a separate class of lawyers. The same issue of whether advocates come under the purview of attorneys in section 171 of ICA¹¹ arose later in the case, **Lalchand Ramchand v. Pyare Dasrath, 1972**¹² where it was contended that 'attorney' is to be used in widely including Advocates and other legal practitioners in the section. Thus, in this section attorney, solicitor and advocate are all construed in the same sense. The question, if an Advocates lien is recognized in the Indian Contract Act, 1872¹³ is cleared and can be concluded that it is. India's stance on such a lien can be examined through various case laws.

Like in the UK that recognized a solicitor's lien, India also recognized an Advocate's lien initially. **Tyabji Dayabhai & Co v. Jetha Devji & Co, 1927**¹⁴ is one of the first cases that addresses the advocate's right to a lien which was then governed by the Solicitors Act of 1860. This case held that the court held that the attorneys are entitled to a common law lien i.e. a particular lien. This lien was attached to the funds that the attorneys recovered for the client in the suit. The court also clarified that a general lien does not apply to attorneys. Similarly, in the case of **Damodar Das v. Morgan & Co, 1934**¹⁵ the court held that the attorneys are only entitled to passive or retaining lien i.e. they can retain the possession of documents, papers etc

⁷ *Id.*

⁸ P. Krishnamachariar v. Official Assignee of Madras 1931, 58 Madras LJ 143 (Ind.).

⁹ Indian Contract Act, *Supra* note [2]

¹⁰ Advocates Act, 1961, No. 25, Acts of Parliament, 1961 (India).

¹¹ Indian Contract Act, *Supra* note [2]

¹² Lalchand Ramchand v. Pyare Dasrath, AIR 1971 MP 245 (India).

¹³ Indian Contract Act, No. 9, Acts of Parliament, 1872 (India).

¹⁴ Tyabji Dayabhai & Co v. Jetha Devji & Co 1927, 29 Bom. L.R. 1196 (India)

¹⁵ Damodar Das v. Morgan & Co. 1934, AIR Cal 341 (India)

but are not entitled to a general lien i.e. they are not entitled to alien over the money obtained by the attorneys for their clients.

The Indian courts had various views on how an advocate's lien would be applicable to the attorneys. In the year 1961, the court in the case of Kuttikrishna Menon v. Cochin Mercantiles¹⁶, stated that the advocates in India should have similar rights as the solicitors in England and held that common law lien would be available to the advocates in India. This position of attorneys withholding documents as lien also created issues and one such issue was addressed in the case of Narayandas Sundarlal Rathi v. Narayandas Harbhagat, 1931¹⁷. The case answered the question of what happens when there is a transfer of attorneys for a client where the new attorneys require the papers withheld by the old attorneys as their right to lien. The court distinguished between two situations that could occur. If the attorney withdraws by himself then the attorney would have to transfer the papers upon conditions but if the client had discharged the solicitor then the solicitor can retain the documents as a lien until the fees are paid. Several other cases gave judgments regarding Advocates lien and how it should be implemented in India but they were very comprehensive and did not have set guidelines. This was rectified by the case **R.D.Saxena v. Balram Prasad Sharma, 2000**¹⁸. This case set the stone for the stance of India on the Advocate's lien. This case held that an advocate's right to lien does not extend to the client's documents even in cases of unpaid fees. Why did the apex court decide this?

Firstly, Justice Thomas contended that case files cannot be "goods" as mentioned in **section 171**¹⁹ of the Indian Contract Act of 1872 as the word "goods" in the act is looked through the lens of the definition of "goods" in Sales Of Goods Act, 1930 section 2(7)²⁰. Secondly, according to the court, the concept of bailment does not apply to case files as Section 148 of ICA, 1872²¹ requires for there to be delivery of goods which is lacking here. Thirdly, the court stated that it would be violative of Article 22(1) of the Indian Constitution²², that every person

¹⁶ Kuttikrishna Menon v. Cochin Mercantiles, (1961) SCC OnLine Ker 85 (India).

¹⁷ Narayandas Sundarlal Rathi v. Narayandas Harbhagat, (1932) 34 Bom. L.R. 703 (India).

¹⁸ D. Saxena v. Balram Prasad Sharma, (2000) AIR SC 3049 (India).

¹⁹ Indian Contract Act, *Supra* note [2]

²⁰ Sale of Goods Act, 1930, § 2(7), No. 3, Acts of Parliament, 1930 (India).

²¹ Indian Contract Act, 1872, § 148, No. 9, Acts of Parliament, 1872 (India).

²² Indian Constitution, art. 22(1)

had to right to be defended by a lawyer of their choice and withholding of case files would violate that right. The court further stated that withholding case files due to unpaid fees could be very dangerous and that it would take a hit on the trust that a client has for their lawyer. Finally, the court stated that the **Bar Council Rules 28²³ and 29²⁴** can be utilised by the advocates by resorting to legal remedies for unpaid fees. The court held that the Advocate's conduct of withholding the case files amounted to misconduct under section 35 of the Advocates Act²⁵. This decision has been used as a precedent even in recent cases like Gayatri Projects Ltd., Hyderabad v. State Of Andhra Pradesh And Others²⁶ and Ram Niwas Sharma v. State Of Haryana and others²⁷

The Stance of United Kingdom a Common Law Country on Solicitors/Advocates lien

Even though India and the United Kingdom are both common law countries they have different stance with regard to how an Advocate lien is available to the professionals in their states. English law has influenced the formulation of Indian Contract Act, of 1872 largely. For a very long time, the rights of an advocate in India were the similar to the rights of the solicitor in the UK as we have seen above in the case of, **Kuttikrishna Menon v. Cochin Mercantiles**²⁸ which was based on the principles of justice, equity and good conscience. What is the purpose of a solicitors lien? This question was answered in the case of **Wilson King v. Lyall(1987)**²⁹ in the court of appeal which stated that the purpose of a solicitor's lien is to protect them against getting no benefit from their efforts during a suit. One essential for the court to grant a lien against a property is for the claim to be satisfied that it is "just and proper". The Solicitors in the United Kingdom are entitled to two different types of lien. Firstly, a true lien is based on possession or a retaining lien where the solicitors have possession over the property and papers held by them during the course of their capacity as the client's lawyer. Secondly, an equitable lien is a right acquired by the solicitors through common law **under Section 73 of the Solicitors Act 1974**³⁰ which provides them security over the property recovered by them

²³ Standards of Professional Conduct and Etiquette, Rules under § 49(1)(c) of the Advocates Act, 1961, r. 28, (2007) SCC, Bar Council of India Rules (India)

²⁴ Standards of Professional Conduct and Etiquette, Rules under § 49(1)(c) of the Advocates Act, 1961, r. 29, (2007) SCC, Bar Council of India Rules (India)

²⁵ Advocates Act, 1961, § 35, No. 25, Acts of Parliament, 1961 (India)

²⁶ Gayatri Projects Ltd., Hyderabad v State of Andhra Pradesh and Others [2013], ALD 6 10

²⁷ Ram Niwas Sharma v. State of Haryana and Others [2016], SCC ONLINE P&H 12819

²⁸ Kuttikrishna Menon, *Supra* note [16]

²⁹ Wilson King v. Lyall, (1987) 37 DLR (4th) 512 (Can.).

³⁰ Solicitors Act 1974, c. 47, § 73 (U.K.).

through their instrumentality. These liens have their own restrictions and conditions in the United Kingdom.

A common law lien is only between a solicitor and the client, this means that the solicitor cannot refuse to provide the documents to a third party for example, a mortgagee. Under sections 77 and 78 of the Legal Profession Act the court has a discretionary power to order the professional retaining the property or documents to return the same to their clients especially when the lien might materially prejudice the client's case or third parties as was similarly held with respect to the third parties in the case of *Re Gladstone*³¹. If the solicitor discharges himself he will have to give up all the documents to the new solicitor as can be seen above in *Narayandas Sundarlal Rathi v. Narayandas Harbhagat*³², an Indian case during the colonial period. The client in this kind of lien will not be entitled to see the document or be entitled to take copies of it. In an equitable lien, no acts can declare the lien void except in cases where a bona fide purchaser purchases the property on the lien without the awareness of the solicitor's rights. On the other hand, if the purchaser is aware of the solicitor's rights then the equitable lien will still apply. For the solicitors to seek justice and claim their liens there is one essential ingredient that the judges have mentioned in two cases *Gavin Edmondson v. Haven*³³ and *Bott v. Ryanair*³⁴. This essential ingredient is that they had provide legal services as a result of which the client had benefitted in some way.

A problem that the UK courts have recently faced is the case of *Ellis v. John Hodge Solicitors* 2022³⁵. The claimant filed a case alleging professional negligence while the defendants refused to provide the claimant with the client file and counterclaimed for the unpaid fees under Section 73 of the Solicitors Act³⁶. How will the claimant proceed with the case of professional negligence without the client file? The claimant took the case to trial anyway where the judge held that, the defendants will have to disclose the case files irrespective of a lien. The court further held that the power to modify the terms of disclosure even when such files are sought under a valid lien because of the principles of natural justice, equity and good conscience.

³¹ *Re Gladstone* (1962), 229 N.Y.S.2d 663 (N.Y. Sur. Ct.)

³² *Narayandas Sundarlal Rathi v. Narayandas Harbhagat*, (1932) AIR (Bom) 363 (India)

³³ *Gavin Edmondson Solicitors Ltd. v. Haven Ins. Co.*, [2018] UKSC 21 (appeal taken from Eng.).

³⁴ *Bott & Co. Solicitors Ltd. v. Ryanair DAC*, [2022] UKSC 8 (appeal taken from Eng.).

³⁵ *Ellis v. John Hodge Solicitors*, [2022] EWHC 2284 (Comm) (Eng.)

³⁶ Solicitors Act, *Supra* note [30]

In another recent case, *Candey Ltd. v. Russell Crumpler*³⁷ the court held that the solicitor, candey has waived their right to lien by accepting additional security (Fixed Fee Agreement) on its fees. The court further held that the solicitor has to communicate expressly regarding its intention to retain the lien upon accepting the new security.

Critical Analysis of R.D. Saxena v. Balram Prasad Sharma, 2000 as against The United Kingdom

India as we have seen earlier recognized Advocate's lien as a right until the judgement of **R.D.Saxena v. Balram Prasad Sharma**³⁸ in the year 2000. The United Kingdom and India had a very similar stance regarding Advocate's lien but in recent decades both India and the United Kingdom have seen an Evolution in their recognition of Advocate's lien to protect the Advocate/Solicitors from the risk of non-payment by their clients. One major difference between the two countries, which is the basis of this paper is that India doesn't recognize General lien against documents & case files for Advocates and advises them to resort to other legal remedies while The United Kingdom recognizes General lien for Advocates with some reasonable restrictions as a right. After examining the stance of the United Kingdom on the Advocate's lien, the important question arises.

Should the concept of General lien against case files & document be completely repealed in India? To answer this question, the case **R.D. Saxena v. Balram Prasad Sharma, 2000**³⁹ must be scrutinized.

Firstly, the court contended that there was no mention of liens in Rules 28³⁹ and 29⁴⁰ of The Bar Council Rules but Section 171 of the Indian Contract Act, 1872⁴¹ clearly allows general lien to 'attorneys of a High Court'. The court held that files containing copies of the records of could not be equated with 'goods' but did not clarify what would amount to 'goods' as Section 171 of ICA⁴² provides the right to General lien to attorneys.

The United Kingdom deals with such issues by providing innovative solutions like in the case of

³⁷ *Candey Ltd. v. Crumpler*, [2022] UKSC 35 (appeal taken from Eng.).

³⁸ *R.D.Saxena*, *Supra* note [18]

³⁹ *Standards of Professional Conduct and Etiquette*, *Supra* note [23]

⁴⁰ *Standards of Professional Conduct and Etiquette*, *Supra* note [24]

⁴¹ *Indian Contract Act*, *Supra* note [2]

⁴² *Id*

Loescher v. Dean (1950) Ch. 491⁴³ the court clarified that trust money cannot be included in a client's account while claiming a Common Law Lien or in the case of *Re Gladstone*⁴⁴ the court ordered the delivery of documents under a lien to prevent prejudice to a third party. Similarly, the Indian courts should have specified what would amount to 'goods' specifically according to section 171 of ICA⁴⁵. The next point to scrutinize would be the contention that 'goods' will not apply to case files and documents. Section 2(7) of Sales of Goods Act of 1930⁴⁶ states that goods mean "Every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale". This definition very well includes 'case files and documents' as it is a movable property. As the court stated, there is no mention of marketability in this definition of goods.

It will also come under the purview of section 148 of the Indian Contract Act⁴⁷ as the 'files and document' are delivered to the advocate by the client and will be returned to the client as per the client's discretion after the suit. The court's contention that the lawyer must resort to legal remedies and file a suit in the court is not practical as it would tarnish the reputation of the advocate. Why would a client approach a lawyer that sues their clients? The Indian apex court in this case and the courts of The United Kingdom had extremely contrary contentions on the rights of the client and the rights of the advocate. The Indian courts amplified that withholding case files will result in the violation of Article 22 of the Indian Constitution⁴⁸ as it will deprive the client of choosing their own choice of lawyer and stated that it would be very dangerous if the solicitor withholds the files and can be heard in the middle of the case.

The United Kingdom protects the rights of the solicitor while India indefinitely has been protecting the rights of the solicitor's client. In this case, the court has completely made General lien against case files & documents inapplicable leaving the advocates to resort to legal remedies and Rule 29 of the Bar Council Rules⁴⁹. While the United Kingdom the courts as seen above has come up with innovative solutions that helps protect the clients while also protecting

⁴³ Loescher v. Dean, [1950] Ch. 491 (Eng.).

⁴⁴ *Re Gladstone*, *Supra* note [31]

⁴⁵ Indian Contract Act, *Supra* note [2]

⁴⁶ Sale of Goods Act, *Supra* note [20]

⁴⁷ Indian Contract Act, *Supra* note [21]

⁴⁸ Indian Constitution, *Supra* note [22]

⁴⁹ Standards of Professional Conduct and Etiquette, *Supra* note [24]

the Solicitors right to unpaid fees. This can be observed in *Gavin Edmondson v. Haven*⁵⁰ and *Bott v. Ryanair*⁵¹.

Are the Remedies Available to the Advocates in India Sufficient?

In my opinion the remedies available to Advocates in India is not sufficient as the lawyer can either resort to legal remedies under Rule 28⁵² or the Advocate is entitled to deduct the fees from any moneys of the client remaining in his hand under Rule 29⁵³ but the right under Rule 29 is also now not available to the lawyer as a result of the decision by the Supreme court⁵⁴ that the lawyer is merely a trustee of his clients moneys. Even if they have a lien on the moneys they cannot retain the same or appropriate it to their fees without the consent of the client. These are the only remedies available to a lawyer for unpaid fees in India. Keeping in mind the societal consequence of these remedies, an Advocate would never sue his own clients as his business would get affected since his profession relies on these clients. An Advocate has many other restrictions on being able to recover their fees as the court regards them to high standards of their profession like they are duty bound to appear in court even when the client does not pay the fees as held in *Basanta Kumar Mitter v. Kusum Kumar Mitter*⁵⁵.

The remedies discussed above are very miniscule and are extremely restricted as the courts in India have high standards of duty for Advocates and more regard for the client's rights. Section 171 of Indian Contract Act⁵⁶ statutorily approves General lien for Advocates. This right must be made available to Indian Advocates within reasonable limits to make sure that there is no malafide and justice is made available by catering to the client's rights while also balancing it with the right if the Advocates for unpaid fees.

In the present ambit of law, the Advocates can contractually assert their right to fees and claim their rights in case of breach by non-payment by the client by suing the client. But as discussed before this would affect the business of the Advocate as they would have to sue clients who give them the business. The Indian law and courts could also adopt multiple measures to create solutions that would balance both the rights of the client and that of their Advocate. This balance

⁵⁰ *Gavin Edmondson*, *Supra* note [33]

⁵¹ *Bott*, *Supra* note [34]

⁵² *Standards of Professional Conduct and Etiquette*, *Supra* note [23]

⁵³ *Standards of Professional Conduct and Etiquette*, *Supra* note [24]

⁵⁴ *In re Shri 'M'*, (1957) AIR 149 (India)

⁵⁵ *Basanta Kumar Mitter v. Kusum Kumar Mitter*, (1900) SCC Online Cal 146 (India)

⁵⁶ *Indian Contract Act*, *Supra* note [2]

can be adopted by looking at the UK courts and how they deal with issues regarding General lien for their solicitors. As discussed above General liens are available to Advocates in the UK but has some limits to the same.

- The advocate can only hold the property until the fees are paid and cannot take any action against such property which would lead to misconduct⁵⁷.
- The Advocates cannot recover amounts for loans made personally to the clients in a personal capacity⁵⁸.
- The Advocates cannot retain some documents like corporate records⁵⁹, mortgage documents⁶⁰, original court records⁶¹, original wills⁶² under a lien.
- No lien can be enforced against documents without authorization from the client⁶³.
- A Solicitor cannot have a general lien when there is a lawful demand for the same by a third party.
- Instead of completely repealing the right to General lien, UK courts have the discretion to order the Advocates to return documents when it deems necessary like when it may prejudice or delay proceedings⁶⁴.
- The solicitor must expressly mention that the validity of a retaining lien when there's security that the advocate had taken to secure his payment. If not expressly mentioned the solicitor is deemed to have given up the right to lien when they take a security.

These are some of the limitations the Indian courts could think about as completely repealing a statutory right of lien of an Advocate is disproportionate. India could amend the Advocates Act, 1961 to include advocate's lien with the necessary limitations put in place as mentioned above.

⁵⁷ Law Soc'y of B.C., Discipline Case Digest, No. 5 (May 1992) (Can.)

⁵⁸ *In re Taylor, Stileman & Underwood*, [1891] 1 Ch. 590 (C.A.)

⁵⁹ *Kingswood Explorations 1985 v. Elkind*, [1988] O.J. No. 955 (Ont. HCJ)

⁶⁰ *Wakefield v. Newbon* (1844), 6 Q.B. 276

⁶¹ *Bird v. Heath* (1848), 6 Hare 236.

⁶² *Balch v. Symes*, (1823) Turn. & R. 87, 37 E.R. 1028.

⁶³ *Gibson v. May* (1853), 4 De G.M. & G. 512

⁶⁴ *Re Gladstone*, [1972] 2 O.R. 127, 25 D.L.R. (3d) 43 (C.A.).

Conclusion

According to the research findings, it is imperative that India reforms its stance on Advocate's lien, as the Advocates in India have miniscule remedies available for recovering their unpaid fees. Even though a general lien against case files & documents could be monstrous to justice and judicial proceedings, this could be curtailed with simple amendments and restrictions to the right of General lien for Advocates as against repealing it completely. The United Kingdom has done a good job balancing the rights of both the clients and the solicitors. Similarly, it is essential that India also rethinks its stance on the availability of a general lien specifically against case files and documents in India.